BOARD OF INQUIRY DECISION

UNDER

THE ONTARIO HUMAN RIGHTS CODE, 1981, C. 53, AS AMENDED

ELAINE McARA

Complainant

- and -

MOTOR COACH INDUSTRIES
and
JEFF CONSTANCE

Respondents

Board of Inquiry: C. Gordon Simmons

Place of Hearing: Toronto

Dates of Hearing: September 23, December 10, 16, 21, and 22, 1987

Appearances: Joan Haberman, Counsel for Elaine McAra and the Ontario Human Rights Commission.

O.R. Siebenmann, Counsel for the Respondents

By letter dated August 31, 1987 I was appointed by the Hon. William Wrye, Minister of Labour, to act as a Board of Inquiry to hear and decide the matter that is now before me. A meeting was held on September 23, 1987 at which time it was agreed that the matter would proceed on its merits on December 10, 16, 21 and 22, 1987. Following completion of the hearing on December 22 it was agreed that the thirty day requirement for release of the decision pursuant to the HUMAN RIGHTS CODE S.O.,Ch.53, S.40 (7) would commence from the date that I received the transcript of these proceedings. The final volumne of the transcript was received on January 20, 1988.

The complainant, Elaine McAra, of Bowmanville, Ontario first filed her complaint under her maiden name dated October 15, 1985 wherein she alleged that Motor Coach Industries, one of the respondents in this matter, and its general manager, Mr. Jeff Constance, rejected her application for employment without granting her a formal interview. She complains that the reason for the refusal is based solely on sex and that her right to equal treatment with respect to employment has been infringed and is contrary to to sections 4(1) and 8 of the HUMAN RIGHTS CODE. (See ex 1,). On June 22, 1987 she lodged another complaint under her married name but in all other respects is identical to the first one. (See ex.2). Mrs. McAra filed a further complaint on

October 23, 1986 alleging further violations of the CODE when she was dismissed from employment by the respondents immediately prior to the exhaustion of her probationary period. The circumstances surrounding this event will become clear as the following discussion unfolds.

The complainant had been employed by Motor Coach Industries in Winnipeg between January 2, 1979 and September 1982 when she returned to school. She has a daughter from a previous marriage. The daughter was born in December 1976. Mr. McAra, the complainant's husband, also works for the respondent. He is a service representative who travels throughout Ontario servicing busses which the respondent manufactures. Until July 1984 Mr. McAra worked out of the Winnipeg office at which time he accepted a transfer to the Newcastle, Ontario location. One of the conditions associated with the move was that he locate within fifteen miles of the Newcastle plant. They complied with this condition by settling in Bowmanville.

The complainant had enjoyed working for the respondent in Winnipeg. Everyone was very cordial and she regarded the employer and its employees as a big happy family. Indeed, she was aware of a newsletter published by the respondent wherein one article was headed Keeping it 'all in the family' which depicted brothers and sisters and other family members working for the respondent.

The complainant's work in Winnipeg with the respondant was as an unskilled labourer. She worked in the paint shop preparing

busses for painting, which consisted of masking and washing them, which included the roofs. She, along with others, used scaffolds to get up to wash the roofs. She was also responsible for cleaning out the inside of the busses such as putty, excess chemicals and other "garbage" that was left inside them.

The position also entailed heavy lifting. The masking referred to above was on heavy paper rolls which, when emptied, had to be replaced. Each roll weighed about 40 - 45 pounds and these changes were carried out perhaps a dozen times a day. One person would be expected to make the change. Another aspect to the job was a requirement to use rags in their work. These rags had to be counted and bundled into bags, placed on carts and taken to the laundry. Further, the employees were responsible for maintaining their areas clean which meant emptying garbage cans of paper into a compactor which compressed it into what may be described as resembling bales of hay. They were then taken to garbage bins where they were lifted into the bins. Each bale weighed "easy 70, 75 pounds each, if not more, approximately" (vol. 1, p. 20). As stated earlier, she left her employment in 1982 to return to school.

Upon locating in Newcastle, Mr. McAra was assigned an office in the warehouse where he usually spent one day a week while the rest of the time he spent travelling throughout the province.

Sometime in October 1984 Mr. McAra learned that a vacancy

existed in the warehouse at Newcastle. Mr. McAra spoke to Mr. Constance, the general manager, asking whether there would be any chance for Mrs. McAra obtaining the position. Mr. McAra's account of what Mr. Constance said is as follows (vol. 1 -transcript p.212);

> A. He definitely just said no. He said that there would be no woman working in the back for the parts department, and I explained...tried to talk to him. I explained that we have had women in Winnipeg work in the parts department and ...without any problem, and Mr. Reske and Mr. Moriss Kowaliuk [supervisory people in Winnipeg] had indicated there had never been a problem. And he said no, he didn't want a woman back, and I believe the reason was because it was working with men. There was five men back there most of the time.
>
> Q. Is that what he told you?
>
> A. No, he just said no, there would be no woman back there.

Mr. McAra informed the complainant about Mr. Constance's reaction when he went home that evening. While being disappointed over receiving such news, Mrs. McAra remained undaunted. She knew that the position was being posted at Canada Manpower so she went there, spoke to one of the employees there who decided that she had the necessary qualifications for the job and that he could send her to the warehouse as an applicant. Next, she telephoned Mr. Constance who asked her to come to the warehouse to fill out an application.

Mrs. McAra saw Mr. Constance in his office. She handed him the application form and, according to her evidence, he put it to one side and he told her that he thought that she would be unable

to do the job because of the heavy lifting involved. She attempted to explain that she had worked on the line in Winnipeg and was accustomed to heavy lifting. In any event, Mrs. McAra stated that Mr. Constance did not look at her application form nor inquire about her work experience in Winnipeg. The interview lasted five to ten minutes. No one else was in the office at the time. Mrs. McAra testified that Mr. Constance never said that anyone would be getting back to her. Subsequently, a few days later she learned through her husband that someone else had been awarded the job. That person's name is Don Lawrence who was hired as a new employee.

Mr. Constance's evidence conflicts somewhat with that of Mrs. McAra over what transpired in the interview. According to his evidence, he looks for experience when he hires new employees. He became aware that Mrs. McAra had worked in the production area in the Winnipeg plant and he did not consider that experience to be relevant in that there is no relationship between work in a warehouse and on a production line. He recalls that when the complainant came to the warehouse, one of the "girls" brought the application into his office which he read, placed it on the desk and invited her in. When she came in they went through the application and her past experience. His evidence is (vol. 2 - p. 16);

> ...She indicated that she had worked on the production line, and that she would like to work at MCI. I asked her did she know there was heavy lifting in the warehouse; she said yes. She said that on the

> production line, she had to pull some heavy chains, to move some equipment of some kind, and she was not concerned with lifting. I said, "if you are not concerned, I am not concerned, and I will take you into consideration.
>
> Q. Did you say anything to her at that time about other applications that you had received?
>
> A. I indicated that there were other applicants coming from Manpower, and I had to see them, and we would make a decision later and let her know.

More will be said about conflicting evidence later in this decision.

Perhaps this would be an appropriate time to set out briefly the nature of the job being discussed in Newcastle. The respondent manufactures busses and parts for busses at its Winnipeg location. The Newcastle warehouse commenced operation in 1980 as a distribution plant for bus parts in Ontario and Eastern Canada. Essentially, it services the bus industry with parts. It consists of an office and a warehouse. There are approximately five or six office employees. In the warehouse there is a parts supervisor, a foreman, a shipper, a receiver and five or six pickers/packers. When orders for parts are received an employee goes to various bins "picking" the parts in the order. Once picked, the same employee goes to a bench where the parts are packed into boxes, ready for shipment. Hence, the title "picker/packer". It is the picker/packer position that the complainant was seeking. It is acknowledged that some of the parts are heavy. A brake drum for a bus is one example. However, there is a fork lift and a high boy available to assist in moving

the heavy parts.

Turning again to the evidence of Mr. Constance, it is apparent that he did not consider the Winnipeg work of the complainant to be be relevant. This contrasts considerably with the evidence of Mr. Mel Edwards, parts supervisor at Newcastle since the warehouse opened in 1980 and the person who is second in command directly under Mr. Constance. Mr. Edwards stated that he had come from a production line and that experience had been of assistance to him.

Mr. Constance's position was assistant manager when the warehouse first opened. The affiliation with Winnipeg was closer then when a Mr. Ed Reske was manager although he was located in Winnipeg. Mr Moriss Kowaliuk, also of Winnipeg was parts supervisor in Winnipeg while Mr. Edwards was slated to be parts superviser at Newcastle. Shortly after becoming employed in 1980, Mr. Edwards spent a two week orientation period in Winnipeg. While there he noticed that a woman was working as a picker. Apparently the pickers and packers each did one of the two functions, but not both. However, Mr. Edwards was more impressed with the quality of her work than that of her male colleagues. He testified that upon his return from Winnipeg in 1980 he raised the subject of having women work in the warehouse with Mr. Constance and was told that he didn't want a woman in the warehouse (vol. 1 pp. 162-166 especially at 165). When the complainant filed her application for employment, Mr. Edwards

again remarked about the woman who was employed in Winnipeg and was asked by Mr. Constance to contact the Winnipeg office concerning her. Mr. Edwards contacted Mr. Kowaliuk by phone and discovered that the woman had left on her own volition but that she would have been retained if she had wanted to stay. Upon informing Mr. Constance about this conversation Mr. Edwards recalled what transpired as follows (vol. 1 p. 133).

> Q. what was the response at that point?
>
> A. I can't remember the exact words, I am sorry. I can't really remember the exact words. I do remember in front of the office, that he was quite adamant, and said that he was the boss and he was ready to fight for his rights.

While I will be returning to this topic later I should indicate here that Mr. Edwards evidence, along with that of Mr. McAra, supra, lead to the inescapable conclusion that Mr. Constance had adopted a position that he was not going to have any woman working in the warehouse if he had anything to say about it. I am convinced, on the evidence to be related, infra, that his position was also applicable in relation to the complainant working there.

To this point in time, the autumn of 1984, the practise that had been followed when hiring new employees was to have Messrs. Constance and Edwards interview the applicants and discuss their relative views over who should be hired. On the occasion of the complainant's interview Mr. Edwards was not invited into Mr. Constance's office for the interview. However, Mr. Edwards

recalls being in his office, which is separated from Mr. Constance's office by glass, when the complainant was interviewed. Moreover, Mr. Edwards did not take any part in the process respecting the complainant's application for employment.

The next series of events occurred in the Spring of 1985 when a second vacancy became available in the warehouse. The complainant's application had remained on file from her prior application. Mr. Edwards informed Mr. McAra who in turn informed the complainant. The complainant testified that she reapplied with the October 1984 application form. That is, she did not put in another new application on this occasion. Mr. Constance did not consider her to be an applicant for the vacancy as his following testimony reveals (vol. 2 pp. 34-5);

> Q. Tell me, was Elaine Shore [complainant's maiden name] an applicant for this position in the Spring of '85?
>
> A. Not that I am aware of.
>
> Q. Did she ever contact you?
>
> A. No she did not.
>
> Q. Did she ever submit an application form?
>
> A. No she did not.
>
> Q. I see. Were you aware that she had ever spoken to anyone in the office?
>
> A. No, I was not.
>
> Q. Did Mr. Edwards ever speak of her to you in the Spring of 1985?
>
> A. No, he did not.

Q. Would you have considered her at the time?

A. No.

Q. Why not?

A. Because it was for a totally French speaking person.

Q. Does she know any French?

A. Not that I am aware of.

The evidence of Mr. Edwards differs from that of Mr. Constance. According to Mr. Edwards evidence, he inquired of Mr. Constance whether the complainant would be considered for the position to which Mr. Constance responded that her application was on file (vol 1 pp. 174-5). In any event, the complainant was not hired for this vacant position either. Nor was she contacted to see if she was still interested in it. The person hired was Mr. Randy Riopelle who is fluently bilingual. Mr. Edwards notified the complainant of this over the phone.

One of the concerns I have with the foregoing evidence is that of Mr. Constance's comments respecting the lack of French capability of the complainant. Whether or not she is bilingual is not the question. The evidence does not reveal that he made any inquiries into the matter to ascertain whether or not the complainant was indeed bilingual. Now if his evidence is to be preferred over that of Mr. Edwards then it is understandable that he was unaware of her continued interest in working for the respondent. However, for reasons that will be explained in more detail later I accept the evidence of Mr. Edwards over that of

Mr. Constance. I am satisfied that he was aware that the complainant was still interested in working for the respondent and, as previously stated, nowhere in the evidence did he satisfy himself that she was unlingual and not bilingual. This is all the more important when it is realized that Mr. Riopelle had had no previous experience in a warehouse operation. As will be seen later on, Mr. Constance prides himself in hiring the most experienced people he can obtain. The circumstances surrounding this particular hiring casts certain doubts on the veracity of such an expressed position.

Another concern that I have about the hiring of a bilingual person for the vacancy being discussed also concerns Mr. Constance's testimony in this regard. He testified that Mr. Reske, Mr. Constance's immediate supervisor in the Winnipeg office insisted that he fill the vacant position on this occasion with a bilingual person. The rationale given for this was the parts business in Quebec was growing and no one at the Newcastle operation could speak French. When someone called in for parts and had difficulty communicating in English the caller was referred to the Winnipeg office where a French speaking person was located. That person would later contact the Newcastle office and relay the information to someone there in English whereupon the order would be filled and sent out. Under such circumstances, it was understandable that concerns existed over the inadequacy to communicate in French at Newcastle. However, Commission

counsel questioned whether or not Mr. Reske had insisted that Mr. Constance fill this position of picker/packer with a bilingual person. Mr. Reske of Winnipeg, did not appear as a witness but in a sworn affidavit supplied to the Commission by Mr. Reske through the respondent's counsel, Mr. Siebenmann, and entered as exhibit 19 reads in part as follows;

> ... That further to the above, sometime in or around the month of April, 1985, I recommended to Mr. Jeff Constance, as his immediate supervisor, that, by reason of the nature and geographic origination of business being conducted out of its plant in the Town of Newcastle, Ontario, that a bilingual person be hired for a position which had a significant amount of immediate customer contact. (my underlining).

In light of the underlined wording above, counsel for the Commission questioned whether the employer had actually insisted that a person being considered for a warehouse position would have met the desires of Mr. Reske as set out in his affidavit. That is, a person working as a picker/packer in the warehouse would not fill the immediate customer contact needs or desires of the respondent as expressed in Mr. Reske's affidavit. Moreover, Mr. Ron Matthews, Vice-President and Controller of MCI from the Winnipeg office testified that a bilingual person hired into the office in Newcastle would have been his first choice. This position is corroborated by Mr. Della Vella, the Human Rights Officer who investigated this matter. Mr. Della Vella testified that in a telephone conversation with Mr. Matthews, the latter said that he did not specifically want a bilingual person in the warehouse.(vol 1 p. 250).

Even Mr. Constance acknowledged that it did not make much sense to hire a bilingual person in the warehouse. His evidence on re-examination is as follows (Vol. 2 pp. 174-5):

> My thought on the matter was that we needed a bilingual person; to force me to put somebody into the warehouse in that position, to me did not make much sense, because of the contact was mainly in the office for answering the phones. I was directed to get somebody in the warehouse in french, and that is what I did. The better situation would have been to hire somebody in the office.

I am left with the impression that it was not overly convenient to extract a person from the warehouse to the office whenever a French speaking caller was on the telephone. Nevertheless, as stated above, Mr. Constance hired a bilingual person in the name of Randy Riopelle for the vacant position. While his position remained that he was under strict orders to hire a bilingual person in the warehouse, Counsel for the Commission argued that this was not so. Rather, it simply was a further manifestation of Mr. Constance's resolve not to hire a female into the warehouse.

We now turn to a third vacancy that occurred for a picker/packer position in the warehouse in July 1985. The complainant learned of it through her husband and Mr. Edwards. She filled out another resume (Ex. 8) and went through the application process all over again. But on this occasion she received no interview. The only contact she received was a telephone call by some unidentified female who informed her that she had not been given the job and that her application would be

kept on file (vol. 1 p. 53). The person hired on this occasion was a Mr. Hoskins. His services were terminated after two months as he proved incapable of performing the required duties. Following Mr. Hoskins' termination, Mr. Edwards asked Mr. Constance if he was going to consider the complainant to which he received a negative reply (vol. 1 p. 148). Subsequently, a Mr. Peter Gynoke was hired for the vacancy.

On July 31st., 1985 the complainant first contacted The Human Rights Commission and, being unable to resolve the complaint, matters progressed from there to this hearing. Her formal complaint was filed on October 15, 1985 (ex. 1).

Meanwhile, another development occurred in June 1986. On June 6 Mr. Constance telephoned the complainant and asked her if she was still interested in the job to which she replied in the affirmative. She went to his office later that afternoon whereupon he informed her that it was not he who was hiring her but that he had been ordered to hire her by the Winnipeg office. She testified that he did not seem pleased about it. In any event, she commenced working on June 23. Her services were terminated just prior to the lapse of her ninety day probationary period. The evidence is clear that when she was hired there was no existing vacancy in the warehouse and she was not replaced after she was terminated (vol. 2 p. 151).

The Winnipeg office was alerted to possible difficulties that the respondent employer might encounter following the third

refusal to hire the complainant during the Summer of 1985 by a phone call from Mr. Edwards to Mr. Matthews. Mr. Edwards placed the call from his home during an evening and asked Mr. Matthews to intervene to at least give the complainant a chance. As we now know, the Winnipeg office did nothing until June, 1986 when it directed Mr. Constance to hire her. He had no choice in the matter (vol. 2 p. 148 et. seq.).

The evidence about the quality of her work is varied. The complainant testified that she inquired of her foreman, Mr. Al Cooper, what the time limits were with respect to picking and packing orders. She had worked under time limits in Winnipeg and assumed that similiar limits were in place in Newcastle. However, she was informed that there were no time limits under which she had to work. Her picking was considered very good in that her counts were accurate, etc. However, she encountered difficulties in packing. Her main difficulties involved choosing accurate sized boxes for the orders. Sometimes she would have an order partially packed only to find that the box she had chosen was either too big or too small and would have to start over again. She also encountered difficulty in steering the fork-lift truck. Unlike an automobile it steers with the rear wheels. She encountered difficulties in manouvering around the bins with it. Moreover, a certain amount of "horseplay" took place in the form of slapping the fork lift by other workers with their hands, or whatever, from behind and out of sight of the driver which caused

a loud noise and caused the complainant to lose her concentration. This "horseplay" was not only directed at the complainant, it was directed randomly at everyone who might be driving the fork lift from time to time. However, on one occasion, one of her colleagues slapped the fork lift while the complainant was driving and, I am satisfied on the evidence, caused her to run into the bin with such velocity that it moved the bin off its footings several inches. No serious harm resulted because the bins are attached to the ceilings, or beams, so it did not fall over. Nevertheless, Mr. Edwards called her into his office and told her that she would have to change her attitude toward the forklift, that she was handling it like a car, and not comprehending the steering of it, and that she would have to shape up in that respect. Mr. Edwards wrote a memorandum to Mr. Constance regarding his warning to her (ex. E11).

Another problem was the complainant is left handed which, according to the complainant, made it appear to the others that she was awkward in packaging orders. She stated that she did not find it awkward but that others found it difficult to assist her because of it. In so far as assistance is concerned, she received assistance from time to time when heavy parts, such as windshields, were concerned. However, after about one month into her employment period she was informed by a fellow worker that he was told by Al Cooper, the foreman, that he could no longer assist her (vol. 1 p. 79). Mr Cooper denied that he had ever

instructed the employees not to help her (vol. 2 p. 194). However, Mr. Lawrence, the person who was hired in November 1984 as a picker/ packer, testified that he informed the complainant that he could no longer assist her. When asked in examination in chief who had told him that he could no longer assist her, he replied "I couldn't tell you right now" (vol.3 p. 38). In my respectful opinion I accept the complainant's evidence that approximately one month after she commenced employment someone in authority gave orders to desist from helping her.

During the course of her employment the complainant admitted that she found picking and packing windshields most difficult. On one occasion she let one windshield fall which caused a chip to its edge. Mr. Edwards stated that it was later sold at cost. However, the complainant expressed the view that she performed her job well and enjoyed the work. Mr. Edwards agreed with her assessment. He testified (vol. 1 pp. 141-2) as follows:

> Q. All right. I know Mrs. McAra eventually did come to work for you in June 1986. Have you had an opportunity to observe her work?
>
> A. Yes.
>
> Q. Knowing what you do now about the way she works and knowing how Mr. Lawrence works, if you had to make the decision today about hiring one between the two of them, who would you hire?
>
> A. I would keep Elaine on, there is no doubt about that. The quality of her work was good.

In any event, the complainant was dismissed on Tuesday, September 23, 1986. She had commenced her employment on June 23,

1986 and I was informed that there was a ninety day probationary period. It was acknowledged that her probationary period was about to expire when her services were terminated. In addition to Mr. Edwards comments above about the quality of the complainant's work, Mr. cooper, the warehouse foreman, testified that her work was, inter alia, too slow, that she could not get used to the handling of equipment, that is, the fork lift and ride a boy, etc. (ex. E9). However, The evidence also reveals that at no time was she warned about her poor job performance except the warnings that Mr. Edwards gave her on Friday, September 19,1986 and that by Mr. Cooper near the end of her emplyment relationship. Moreover, the evidence revealed that other employees also ran into bins, etc., with the equipment. Mr. Edwards explained that he was unaware of her impending termination until the day that it actually happened. He was disappointed that she was being terminated. He had the responsibility of watching and determining the work effort of employees and appraising them and informing Mr. Constance of these matters. Now, the complainant was being terminated without any imput from him (vol. 1 p. 160).

The facts surrounding the method followed in terminating the complainant's services raise further doubts about the veracity of Mr. Constance's evidence. He informed the Board that he did not take part in the decision to terminate the complainant's services. Instead, he left the decision entirely with Mr. Cooper, the foreman (vol. 2 pp. 152, 3). However, later in his evidence

he referred to Mr. Cooper's recommendation regarding "whether she was going to make it"(vol.2 p. 159). Mr. Cooper testified that he simply kept Mr. Constance informed of her progress and that he did not make the decision to terminate her (vol. 2 pp. 211 -12). According to the complainant's evidence her services were terminated in the following manner (vol 1. pp. 73-4);

> Q.Okay.
> Now, you were terminated on September the 23rd. That was a Tuesday, I think you said?
>
> A. Yes it was.
>
> Q. And you received that warning on the Friday before, you told us? [This was the warning by Mr. Edwards]
>
> A. Yes.
>
> Q. Did anything happen on the Monday?
>
> A. No. it was a calm day.
>
> Q. Who actually fired you?
>
> A. Jeff Constance.
>
> Q. Tell me what happened?
>
> A. We were just starting the day off, and Al Cooper came to the back and said that Mr. Constance would like to see me in his office, and I said fine, and away we went. And we sat down, Al Cooper and myself and Mr. Constance in Mr. Constance's office. And he said, "Things are not working out. This will be your last day. You will be paid until the end of the week". And I was devastated.
>
> Q.Did you ask him what the problem was?
>
> A. No, I was too upset. I thought Mr. Al Cooper would intervene, but he said nothing...

In light of the forgoing I must conclude that Mr. Constance

actually took part in the decision to terminate the complainant's services and his statement that he left the decision entirely with Mr. Cooper is simply not the case.

As stated at the beginning of these reasons, Mrs. McAra filed a second complaint on October 23, 1986. In it she alleged that the usual practise of having one's supervisor terminate employees was not carried out in this instance. Further, that her supervisor, Mr. Mel Edwards, was informed of the decision five minutes before the termination took place; that the decision was made without consultation with Mr. Edwards and that Mr. Edwards disagreed with Mr. Constance. She claimed that the quality of her work was as good as any other new employee. In addition to Sections 4(1) and 8 in the CODE which she had alleged in her first complaint she added Section 7. Section 7 prohibits reprisals for pursuing one's rights under the CODE.

To elaborate on some of the allegations contained in this second complaint the evidence revealed that Mr. Edwards, parts supervisor, participated in the hiring and firing process. He, along with Mr. Constance would interview prospective employees together, discuss the matter and decide whether or not to hire an applicant. He also participated in the firing process. He stated that the last person that he was required to dismiss was Mr. Hoskins (vol. 1 p. 131). Mr. Hoskins was the employee who was hired to fill the third vacancy. It is acknowledged that Mr. Constance had the final say in who was to be hired if the two of

them could not agree. I am led to understand that the decision making process usually followed a concensus between them. However, when the complainant was interviewed by Mr. Constance, Mr. Edwards was not invited to participate nor did he participate in any manner in the process. Moreover, Mr. Edwards was excluded from any involvement in her termination. Indeed, Mr. Edwards no longer participates in this process and, with one exception, that of hiring Mr. Lawrence, has not done so since the complainant first appeared on the scene. Moreover, Mr. Edwards' role prior to the complainant's appearance as an applicant was to conduct periodic evaluations of the entire staff. He no longer performs this function either. Furthermore, he stated that his own performance-evaluations done by Mr. Constance since the happening of this matter have not been good (vol.1 pp. 161-2). I find it somewhat curious that Mr. Edwards role in such matters was so suddenly changed.

But the above problems are ones that exist between Mr. Edwards and Mr. Constance and not between the complainant and the respondents. It is true that Mr. Constance excluded Mr. Edwards from the decision making processes in so far as matters relating to the complainant were concerned but I fail to understand what difference it would have made in the final result. Mr. Edwards would likely have made his views known to Mr. Constance, viz., that he would have retained her, etc., but it is acknowledged that Mr. Constance had the authority to make the final decision.

Therefore, I do not attach a great deal of signifance to those aspects of her complaint relating to the non presence of Mr. Edwards at these meetings.

There is however one aspect to the complainant's second complaint that merits consideration. In it she claims that her rights have also been infringed under section 7 of the CODE. Section 7 reads:

> Every person has a right to claim and enforce his or her rights under the Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

It was acknowledged by Mr. Constance that there were no vacancies when he was instructed by Winnipeg to hire the complainant. It is also acknowledged that no replacement was hired to fill her position after her services were terminated. When she was first hired, the complainant informed Mr. Constance that by accepting the offer she was not doing so in settlement of her original complaint and she, in fact, continued to pursue it. Counsel for the Commission argued that the respondent had decided that she would not become a permanent employee (as opposed to probationary) before she was actually hired. It was never contemplated that she would be continued after the probationary period.

With respect, even if I were to agree with the above submissions I do not understand how this advances the complainant's case. Sections 4 (1) and 8 are contained in all of

the complaints and, as will be revealed later, these allegations have succeeded. In so far as Section 7 is concerned I do not believe that the evidence is sufficiently convincing that the respondents actually acted in a manner that could be regarded as some form of reprisal. Perhaps what may appropriately describe what happened was the presence of a certain attitude that prevailed throughout this entire affair.

While I consider the sudden change in Mr. Edwards role to be somewhat curious there is another curious matter that likewise happened when the complainant was hired in June 1986. This concerns a sudden change that happened to the complainant's husband at the time when she was hired. As stated earlier, he is also an employee of the respondent and has been so employed for eleven years. He transferred to Newcastle from Winnipeg in July of 1984. He is a service representative who calls on customers after coach sales and assists them with maintenance, warranty and related problems. His territory includes all of Ontario. Also mentioned earlier was the requirement that he locate within a fifteen mile radius of the Newcastle warehouse. This requirement was imposed by his superior, Mr. Werner Martin the Executive Vice President of the respondent. His superiors are located in Winnipeg. That is, he is not under the direction of anyone in Newcastle. Mr. McAra explained the reason for having to be so close to the warehouse was in order to assist the parts department in the Newcastle warehouse. Another stipulation was

that he would be given an office in the parts department at Newcastle.

All of the above changed in June 1986. The complainant had been contacted by Mr. Constance about the job offer on Friday, June 6. On Thursday, June 5 Mr. McAra was in Wawa, Ontario returning from a business trip to Winnipeg when he received a telephone call from his immediate supervisor in Winnipeg, Mr. Steve Steenbergen, wherein Mr. McAra was advised that he was to vacate his office the following week and set up his office in his home. The respondent purchased an answering machine for his home telephone which takes messages when no one is at home to take the calls. He is no longer provided with secretarial services and there are other inconveniences since he began working out of his home. Mr. Edwards also testified that this arrangement is not satisfactory. He frequently used Mr. McAra's expertise when he was located in the warehouse but now it is more awkward to do so. Mr. McAra's attempts to ascertain why this sudden change occurred have been unsuccessful. The only responses he gets from Mr. Steenbergen and Mr. Steenbergen's supervisor is "the powers that be" made the decision. To this day he has received no satisfactory explanation. One cannot help but speculate that the hiring of the complainant at that time had something to do with the decision.

Finally, there is the alleged comment or comments by Mr. Constance to the effect that he would not have a woman working in

the warehouse. Mr. Constance admitted that he made the comment but that it was made in relation to the complainant only and was not intended to be understood as meaning women in general (vol.1 pp. 96 through 102, especially p.99). Offsetting this evidence we have Mr. McAra's evidence where he stated that he intrepreted Mr. Constance's comments to apply generally. Moreover, Mr. Edwards testified that Mr. Constance had made such comments before the complainant came upon the scene. Further, Mr. Edward Reske, Mr. Constance's immediate supervisor, in an affidavit which was filed in evidence, stated, in part, the following; (ex. 19)

> That sometime early in the month of March, 1986, I received a long distance telephone call from a person who identified himself to me as Mr. Della Bella [sic] and that he was associated with the Ontario Human Rights Commission. That I had had no prior indication of this call. That at the time Mr. Della Bella asked me about a meeting which I had had a long time prior with Mr. Jeff Constance in relation to hiring a new person to work in the warehouse in Newcastle; that in the course of that conversation I readily admitted to Mr. Della Bella that Mr. Constance in fact expressed to me at that meeting a disinclination to hire a woman for the specific job being discussed because of the heavy lifting which it involved...

Another affidavit filed in evidence was that of Mr. Morris Kowaliuk, also of the Winnipeg office which reads, in part (ex. E23);

> ...That I told Mr. Della Bella [sic], honestly and to the best of my immediate recollection at that time, that Mr. Constance had expressed a disinclination to hire a female for the position because of the physical rigors of it. That, if I did not in fact tell Mr. Della Bella of this rationale on the part of Mr. Constance, as expressed to me at the time, it is certainly my

> present recollection after having had an opportunity of considering the matter, that this was in fact stated by him at that time.

The last sentence reproduced above deserves comment. Mr. Della Vella gave evidence during these proceedings. He testified that he spoke to the two above named gentlemen, whose affidavits are set out above, on the telephone. Following the conversation Mr. Della Vella made notes on what had been said, recalled Mr. Kowaliuk on the phone and read over what his notes contained. Mr. Kowaliuk agreed that the notes were an accurate accounting of what was said. Further, when requested by Mr. Della Vella would he sign an acknowledgement to that effect, Mr. Kowaliuk replied in the affirmative. Mr. Della Vella had the notes typed, sent them to Mr. Kowaliuk whereupon Mr. Kowaliuk signed it and returned it (ex. 18). This signed statement was introduced into evidence without objection. Mr. Kowaliuk stated in it that he could not recall if Mr. Constance provided a reason (for his disinclination in hiring a female in the warehouse. Mr. Reske signed a similiar statement provided by Mr. Della Vella (ex. 16). That statement records three telephone conversations. The first one was Feb 6/86 where Mr. Reske reveals that Mr. Constance made a comment about not having a woman in the warehouse. On the second and third conversations Mr. Reske adds that the reason offered by Mr. Constance was due to the heavy lifting. Counsel for the Commission argued that the heavy lifting in both instances were afterthoughts by Messrs. Reske and Kowaliuk. While

exhibits 16 and 18 were admitted into evidence without objection I am reluctant to place weight on them especially where they conflict with their sworn affidavits. In the final analysis I do not consider it to be necessary to place weight on such statements. Mr. Edwards evidence is clear that Mr. Constance made statements that he would not have a woman in the warehouse before the complainant entered upon the scene [see page 8 of these reasons]. I accept Mr. Edwards testimony in this respect.

I believe the evidence supports the conclusion that the same result would have been reached no matter who the female applicant may have been. Mr. Constance simply was not prepared to have a female employee working as a picker/packer in the warehouse. While he expressed his concern to her about the heavy lifting requirements in the job during the interview in October 1984, (that is the application for the first vacancy) she informed him that she was used to heavy lifting from her previous employment in the Winnipeg operations and was not concerned about lifting. Mr. Constance testified "if you are not concerned, I am not concerned, and I will take you into consideration" (vol. 2 p. 16).

With respect, I do not believe that he took her into consideration for the position. I am satisfied on all of the evidence that he had no intention of hiring her into the warehouse and one of the reasons is, in my opinion, due to the fact that she is a female. I acknowledge that the complainant may

indeed have been unable to perform the work because of the lifting requirements but having assured him that lifting was not a concern for her, and having informed him that she had been accustomed to heavy lifting while at the Winnipeg job he ought to have given her application serious consideration. As stated above, I am satisfied on all of the evidence that one of the reasons for not doing so was due to the fact that the complainant is female.

In his defence, Mr. Constance explained that the complainant lacked the required experience. According to him, she was the least experienced of all the applicants. Mr. Edwards disagreed. He regarded the Winnipeg experience as being relevant. Moreover, the complainant had acquired a job with a company referred to as "Charterways" which owns a fleet of school busses. The complainant was employed by Charterways as a school bus driver which Mr. Edwards considered relevant for the position of picker/packer. Mr. Constance discarded both activities as being completely irrelevant. Mr. Edwards stated that he was not in favour of hiring Mr. Lawrence because of a perceived lack of ambition and attitude in him. He sought unsuccessfully to have the complainant given a chance. This is evident when, following the Hoskins termination Mr. Edwards asked Mr. Constance whether the complainant was going to be considered to which Mr. Constance replied "no" (vol 1 p. 148). It will be remembered that Mr. Edwards' advice in these matters was no longer sought following

Mr. Lawrence's hiring for the first vacancy. Mr. Riopelle had no prior experience and he fared out well and is still with the company. Granted, Mr. Riopelle was hired because of the French component that was discussed above. However, the complainant exhibited a strong desire to be employed and one would have thought that this enthusiasm and determination ought to have had some positive influence on Mr. Constance's decision.

In my opinion, while the defence on experience may be proper, assuming that he did place great reliance on experience, I nevertheless do not accept this explanation as being his sole reason for not seriously considering the complainant's application. The evidence reveals a strong dertermination by Mr. Constance not to have a female employee in the warehouse. Even if I were to accept Mr. Constance's explanation as being the primary reason for not employing the complainant I remain of the view that another reason for not hiring her was due to her sex. This latter reason need not be the primary reason. It need only form a part of the reason. As stated in Patricia Whitehead v. Servodyne Canada Ltd. and Kevin Dooling (1986) 8 C.H.R.R. D/3874 (Soberman)

> 30682 Discrimination based on sex, prohibited by section 4(1) of the Human Rights Code, need not be the sole nor even the dominant factor in the treatment of a complainant. It is enough that sexual discrimination was a material element in the decision to dismiss... and the evidence here establishes that it was...

This approach has been followed by Boards of Inquiry in a number of instances. It was also approved by the courts in Regina v. Bushnell Communications Limited (1973), 45 D.L.R. (3d) 218

(O.H.C.) per Hughes J. at p. 223, aff'd. (1974), 47 D.L.R. (3d) 668 (Ont. C.A.) per Evans JA.

Accordingly, for all of the reasons set out in this decision I find that the complainant's rights under section 4 (1) of the HUMAN RIGHTS CODE have been infringed by the respondents and that the infringement is a contravention of Section 8 of the CODE. Having found that the CODE has been contravened I am authorized, pursuant to Section 40 of the CODE, to issue certain directions.

Before doing so I wish to acknowledge that in his argument, counsel for the respondents, suggested that should I find that discrimination existed in the instant case that I find that the company be responsible and not Mr. Constance. He stated that it would be unfair to Mr. Constance to conclude "that he was somehow acting privately out of his own motives, and contrary to the intention or interest of the company" (vol. 4 p.113). In my respectful opinion, both Mr. Constance and the company have infringed the rights of the complainant. I have expressed my views above on Mr. Constance's involvement. But the company also played a part in this matter. Mr. Matthews was notified by a concerned Mr. Edwards that problems were present yet Mr. Matthews elected to do nothing. Whether it was he or someone else in the Winnipeg office who issued the directive to Mr. Constance to hire the complainant in June 1986 the directive was not issued until several months after Mr. Matthews was contacted by Mr. Edwards. Also, Mr. McAra spoke to Mr. Matthews over the phone and was

likewise unsuccessful in getting any action. Therefore, I find that both respondents are responsible for infringing the complainant's rights.

I now turn to the issue of damages. The Commission seeks relief both on its own behalf and on behalf of Mrs. McAra for breaches of the CODE. I will first address the areas of relief which the Commission seeks on its own behalf.

First, it seeks a letter of intention from the respondents that they will undertake to comply with the terms THE HUMAN RIGHTS CODE in the future. I agree and direct Mr. Constance and one other senior official of the company to write to the Human Rights Commission in Toronto stating that they intend to undertake to comply with all of the terms of the CODE in the future.

Second, that provisions of THE HUMAN RIGHTS CODE be posted in prominent places in the Newcastle branch. I agree and direct that provisions of THE HUMAN RIGHTS CODE be posted in prominent places in the warehouse and office in the Newcastle branch.

Third, that a copy of this decision be forwarded to the person with whom MCI negotiates their federal contracts with a copy to the human rights supervisor handling this file. There was very little evidence respecting the contracts that exist between MCI and the federal government. I fail to understand the nature of this request nor the purpose it would serve. I deny this request.

Fourth, the Commission seeks to have an opportunity to review the job application forms and have input into revising them. Again, I do not consider this to be necessary. The respondents must be aware of the concerns that were expressed by the Commission and will undoubtedly make the neccessary revisions.

The Commission also seeks relief on behalf of Mrs. McAra.

First, addressing general damages, I was referred to Section 40 (1) (b) which reads;

> direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

The Commission seeks $5,000.00 under this subsection. In support of this claim, counsel pointed out that the complainant was turned down three times when she applied for a position and on each occasion she felt a little worse. Being forced to live within a fifteen mile radius of Newcastle lessened her job opportunities but she had assumed that the company had a policy of employing relatives only to find that such was not the case so far as she was concerned. Mrs. McAra testified that she worked in a strained atmosphere while working at the Newcastle warehouse. She sensed a tension and a fear of Mr. Constance in the other employees. However, she believed that her co-workers accepted her. She also expressed the view that she believed that if she had been hired for the first vacancy there would not have

been the tension present and that she would have succeeded in remaining an employee. She testified that whenever she and Mr. Edwards engaged in a discussion Mr. Constance would come out of his office and either break up the conversation or eavesdrop (vol. 3 pp.135-137). In my opinion, Mrs. McAra did suffer mental anguish throughout this ordeal. Moreover, I find that Mr. Constance infringed her rights in a wilfull and reckless manner.

In attempting to determine an appropriate award of general damages I have not only considered the facts of the instant case but have also reviewed other decisions that have been confronted with this issue. Those cases include TORRES V. ROYALTY KITCHENWARE LIMITED (1982) 3 C.H.R.R. D/858; RAND V. SEALY EASTERN (1982) 3 C.H.R.R. D/938; CAMERON V. NELGOR CASTLE (1984) 5 C.H.R.R. D/1927; and GLADSTONE LESLIE SCOTT V. FOSTER WHEELER LTD. (1986) 7 C.H.R.R. D/3193, aff'd on this point in FOSTER WHEELER LIMITED V. ONTARIO HUMAN RIGHTS COMMISSION ET. AL. (1987) 8 C.H.R.R. D/4179 (Div. Ct.). Having considered these cases and having regard to the circumstances of this case I have decided that an appropriate award of general damages should be $2500.00.

In assessing special damages I intend to use the computations that were supplied to me by counsel for the Commission and are as follows.

SPECIAL DAMAGES FOR ELAINE McARA
FROM OCTOBER 29, 1984 TO DECEMBER 31, 1987

I. 1984

- Actual earnings from Sept. 1/84 - Dec. 31/84 at Charterways = $1,996.26 (Ex. 10)

- $1,996.26/4 months = $499.06 per month

- Had she been hired by M.C.I. on Oct. 29/84 at advertised rate of $1,600.00 per month she would have earned $1,600.00 x 2 = $3,200.00 (Ex. 5)

Instead she earned $499.06 x 2 = $ 998.12

claim for 1984 $2,201.88

II. 1985

- Actual earnings at Charterways for Jan. 1/85 - Dec. 31/85 = $8,156.03 (Ex. 11)

- Had she been working at M.C.I. for that period, she would have been earning at least $1,600.00 per month.

$1,600.00 x 12 months = $19,200.00 less what she did earn $ 8,156.03

claim for 1985 $11,043.97

III. 1986

- Actual earnings for Charterways for 9 months (Jan. 1/86 - June 16/86; Oct. 1/86 - Dec. 31/86) = $5,275.63/9 (Ex. 12)
  = 586.18 per month

- Had she been working at M.C.I. for entire 1986 year, she would have earned $20,700.00 (Ex. 9)

$20,700/12 months = $ 1,725.00 earnings per month

$ 1,725.00 x 9 months = $15,525.10 less actual earnings of

$586.18 x 9 = $ 5,275.62

claim for 1986 $10,249.38

IV. 1987

- Actual earnings at Charterways for 38 weeks (Jan. 1/87 - June 27/87; Oct. 1/87 - Dec. 31/87) = $262.80 per week (Ex. 13)

- Had she been working at M.C.I. for this period she would have earned at least $20,700.00 per year/52

$398.08 per week x 38 weeks	=	$15,127.04
less what she earned:		
$262.80 x 38 weeks	=	$ 9,986.40
claim for 1987		$ 5,140.64

V. TOTAL CLAIM FOR PAST LOSS OF WAGES:

1984	$ 2,201.88
1985	$ 11,043.97
1986	$ 10,249.38
1987	$ 5,140.64
	$ 28,635.00

The issue of mitigation was also addressed during these proceedings. Mrs. McAra sought employment through newspaper advertisements and at the Canada Manpower office. In most instances she had to decline work because the available positions involved shift work. She was forced to decline those positions because of her daughter, aged nine or ten, who would be home alone. It will be remembered that Mr. McAra travels alot and is away from home three or four nights per week.

However, Mrs. McAra was able to locate part time work driving a school bus for Charterways which was compatible with her need for looking after her daughter. While working with Charterways she continued to seek full time employment with

steady day (non shift) work but without success. This straight day time work was an added attraction for her at MCI which was what the job entailed. I am satisfied that she took reasonable steps to mitigate her losses and therefore find that she is entitled to the $28,635.00 set out above representing lost wages.

Finally, a further claim for future lost earnings was requested. It was pointed out that because the complainant continues to have difficulty in finding alternate employment she is entitled to be compensated by the respondents for her continuing losses. It was submitted that payment for these future lost earnings ought to cover the 1988 calendar year. With respect, I am unable to agree with this submission. Mrs. McAra continues to look for alternate employment and it is conceivable that she might find alternate work tomorrow, next week or, indeed, may have already found employment elsewhere. To make such an order in these circumstances could result in a windfall for her and result in being a form of punishment for the respondents. Moreover, if such an award were granted it could afford the complainant an opportunity to forego her efforts in seeking alternate employment. I do not wish to be understood as saying that she would actually interupt her efforts to find alternate employment but the temptation would be present to do so.

The complainant also seeks reinstatement. Boards of inquiry have fashioned such a remedy in the past, see CINDY CAMERON V. NEL-GOR CASTLE NURSING HOME AND MERLENE NELSON (1984) 5 C.H.R.R.

D/ 2170 at 18566. However, in exploring this issue with counsel for both parties I agree that it would be inappropriate to order her to be reinstated. The Newcastle operation is a small one which employs a dozen or so persons. In my view "the well has been poisoned" by what has transpired over the past three years and it would not be appropriate to place her in that environment again.

There remains the issue of interest. Boards of inquiry have held that interest is payable on both special and general damages, see CINDY CAMERON supra, para. 18564 and the cases cited therein. Some boards of inquiry have adopted a "mid-point" approach. That is, the mid point between serving the respondents with the complaint and the date of the award, see PATRICIA WHITEHEAD V. SERVODYNE CANADA LTD. AND KEVIN DOOLING (1986) 8 C.H.R.R. D/3874 at para. 30699. I adopt this approach and direct that interest be paid from the mid point between the serving of the complaint on the respondents to the date of this award. The rate of interest shall be 11% per annum.

Finally, the parties made submissions over whether the respondents are to make deductions from the amount awarded to the complainant. I have had an opportunity to review the submissions, as well as the references to which they referred me to. My understanding of the present situation is that any payment ordered respecting discrimination due to a refusal to hire is in the nature of an award for personal injuries and is not subject

to income tax. However, an award made as a result of an improper termination falls within the extended definition of a "retiring allowance" pursuant to section 248 (1) of the Income Tax Act and is taxable under Section 56 (1)(a)(ii). I have indicated that I consider the complainant's employment arrangement with the respondent not to have been bona fide. There was no vacancy when she was hired and her position has not been filled since she was terminated in September 1986. In my view the damages that are being awarded in this case relate solely to the refusal to hire her. That is the underlying basis for this award. The probationary period was not a real probationary employment relationship and I do not regard any of the damages being awarded as forming a termination or retiring allowance. In my view therefore, there ought to be no deductions from the damages being awarded.

At the close of argument, counsel for the respondents submitted that if damages are to be awarded then no award ought to be awarded after September 23, 1986, the date when her services were terminated because she failed to become a permanent employee due to her poor quality of work. I reject that argument. I am satisfied on the evidence that it was not the quality of work that caused her termination. There simply was no vacancy available and her services were not required.

Accordingly, for the reasons set out above I order as follows:

1. That, Mr. Constance and one other senior official each write a letter of intention to the Human Rights Commission stating an intention that they undertake to comply with terms of the Human Rights Code in the future;

2. That, provisions of the Human Rights Code be posted in prominent places in the warehouse and office in the Newcastle branch;

3. That, the respondents are jointly and severally liable to pay forthwith to the complainant, Elaine McAra, the following;

(a) As damages as lost wages for failing to hire her, the sum of twenty eight thousand, six hundred and thirty five ($28,635.00) dollars.

(b) As general damages, the sum of twenty five hundred ($2,500.00) dollars.

(c) interest as discussed above.

Dated at Kingston, Ontario this 18th., day of February, 1988

Gordon Simmons,

Board of Inquiry.